VAGUENESS PRINCIPLES

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ABSTRACT

Courts have construed the right to due process to prohibit vague criminal statutes. Vague statutes fail to give sufficient notice, lead to arbitrary and discriminatory enforcement, and represent an unwarranted delegation to law enforcement. But these concerns are hardly limited to prosecutions under vague statutes. The modern expansion of criminal codes and broad deference to prosecutorial discretion imperil the same principles that the vagueness doctrine was designed to protect. As this Essay explains, there is no reason to limit the protection of these principles to vague statutes. Courts should instead revisit current doctrines which regularly permit insufficient notice, arbitrary and discriminatory enforcement, and unwarranted delegations in the enforcement of non-vague criminal laws.

I. INTRODUCTION

Last term, in *Johnson v. United States*, the Supreme Court held that a portion of the Armed Career Criminal Act was unconstitutionally vague.[1] This is the second time in five years that the Court has used the vagueness doctrine to strike down or significantly limit a criminal statute.[2] The void-for-vagueness doctrine is hardly a new invention. Since 1914,[3] the Court has

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1. Johnson v. United States, 135 S. Ct. 2551, 2563 (2015).
2. *See* Skilling v. United States, 561 U.S. 358, 406–08 (2010) (adopting a limiting construction of 18 U.S.C. § 1346, the "honest services" statute of federal mail fraud, "to avoid constitutional difficulties" because if the statute "proscribe[d] a wider range of offensive conduct . . . [it] would raise the due process concerns underlying the vagueness doctrine").
3. *See* Int'l Harvester Co. of Am. v. Kentucky, 234 U.S. 216 (1914); *see also Johnson*, 135 S. Ct. at 2570 (Thomas, J., concurring in the judgment) (identifying *International Harvester* as

insisted that the Due Process Clause requires that a criminal statute "clearly define the conduct it proscribes."[4] Laws that are insufficiently definite, the Court has said, fail to give the public sufficient notice about what conduct is prohibited, lead to arbitrary and discriminatory enforcement, and represent an impermissible delegation by the legislature.

At the same time that courts have enforced the prohibition against vague statutes, they have neglected to take the principles underlying vagueness seriously in other criminal justice contexts. Ordinary criminal prosecutions often raise the same problems as vague statutes. For example, the current state of traffic laws and traffic enforcement have led to enforcement that is as arbitrary and discriminatory as the enforcement of vague laws.[5] And there is a rich literature explaining how the broad discretion accorded to prosecutors in charging and plea bargaining has led to arbitrary and discriminatory enforcement.[6] Arbitrary and discriminatory enforcement are not the only vagueness principles that are threatened by the enforcement of non-vague statutes. Non-vague laws also fail to give defendants notice about their criminal exposure, and those laws regularly delegate criminal policy matters to the executive. Yet, outside the vagueness context, current doctrine provides no avenue for defendants to raise these arguments.

There are two important features of the modern criminal justice system that create vagueness concerns in the enforcement of non-vague statutes. First, criminal codes have expanded dramatically in modern times. Not only are new statutes enacted to prohibit increasing amounts of behavior, but broadly worded statutes also allow the executive to find some criminal provision into which it can shoehorn any undesirable behavior. And for behavior that should obviously be prohibited, Congress and most state legislatures have enacted a wide array of overlapping criminal statutes with

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the first case in which the U.S. Supreme Court "nullified a law on vagueness grounds under the Due Process Clause").

4. *Skilling*, 561 U.S. at 415 (Scalia, J., concurring in part and concurring in the judgment).

5. *See, e.g.*, WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 3 (2011); Kim Forde-Mazrui, *Ruling out the Rule of Law*, 60 VAND. L. REV. 1497, 1503 (2007); Tracey Maclin, *What Can Fourth Amendment Doctrine Learn from Vagueness Doctrine?*, 3 U. PA. J. CONST. L. 398, 403 (2001).

6. For just a small sample of that literature, see Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Gerald E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading off?*, 55 STAN. L. REV. 1399 (2003); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) [hereinafter Stuntz, *Pathological*]; William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004).

different penalty provisions. These overlapping statutes allow prosecutors to choose from a large "menu" of criminal charges—a defendant may be charged with a crime carrying a harsh sentence or a more lenient one, as the prosecutor sees fit—and it also allows prosecutors to add or drop duplicative charges in order to pressure defendants to enter a guilty plea.

Second, courts have largely exempted law enforcement decisionmaking from judicial review. Aside from asking whether a police officer had probable cause to arrest, or whether a prosecutor had probable cause to bring charges, courts will not review arrest, charging, or plea bargaining decisions. A defendant is powerless to obtain review, for example, of a prosecutor's decision to bring more serious charges against her than against other similarly situated defendants. The Supreme Court says that these decisions are committed to the discretion of the executive.[7]

In allowing nearly unfettered executive discretion in a system of overlapping criminal laws, courts have permitted the same problems created by vague statutes to proliferate in the modern criminal justice system. A single criminal statute, viewed in isolation, may not be vague. But broad, overlapping criminal statutes, combined with unfettered discretion in arresting, charging, and plea bargaining, result in a criminal justice system that perpetuates the same problems associated with vague statutes. The current system fails to provide sufficient notice to the public, it allows arbitrary and discriminatory enforcement, and it delegates significant authority over criminal justice policy from the legislature to the executive.

This Essay demonstrates that, in order to take the due process principles identified in the vagueness doctrine seriously, it is not enough simply to strike down vague statutes. If the Due Process Clause requires notice, prohibits arbitrary and discriminatory enforcement, and forbids policy delegations over criminal matters, then courts should vindicate those principles in other contexts, including when they are threatened by the enforcement of non-vague statutes.

This Essay proceeds in three parts. Part I provides an overview of the void-for-vagueness doctrine. Part II demonstrates that vagueness principles are often threatened by other practices in criminal law enforcement. The section

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7. To be sure, courts have said that police and prosecutors may not make decisions that are motivated by either a defendant's membership in a suspect class, such as a particular race or religion, or a desire to interfere with a defendant's constitutional rights. Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1372 (1987) (collecting cases). But at the same time, courts have created various doctrines that make it almost impossible for a defendant to obtain the information necessary to show that police or prosecutors had such motivations. And even if a defendant was able to make such a showing, it is unclear what recourse, if any, would exist.

begins by describing the expansion of criminal codes and explaining current charging and bargaining practices under modern criminal codes. It then demonstrates how the modern criminal justice system regularly fails to provide defendants notice about their punishment exposure, permits arbitrary and discriminatory enforcement, and delegates power from the legislature to prosecutors. Part III concludes by observing that there is no independent reason to limit the vindication of due process principles to that context and by offering some preliminary thoughts on how the courts could ensure that those principles are protected in other contexts.

II. THE VAGUENESS DOCTRINE

The void-for-vagueness doctrine requires that a criminal statute "clearly define the conduct it proscribes."[8] Laws that are insufficiently precise violate the Due Process Clauses.[9] The Supreme Court has found a number of laws to be unconstitutionally vague. For example, in *Kolender v. Lawson*,[10] the Court struck down a California statute requiring persons who loiter or wander on the streets to provide "credible and reliable" identification whenever requested by the police. The Court held that the statute was unconstitutionally vague because it failed to clarify what constituted "credible and reliable" identification.[11] Similarly, in *Smith v. Goguen*,[12] the Court struck down a Massachusetts statute that criminalized public contemptuous treatment of the U.S. flag for failing to define "contemptuous treatment."[13]

More recently, in *City of Chicago v. Morales*,[14] the Court used the vagueness doctrine to strike down a Chicago anti-loitering ordinance aimed at gang members. The city ordinance prohibited "criminal street gang members" from loitering in public places.[15] The ordinance defined the term "loiter" as "to remain in any one place with no apparent purpose," a definition that the Court deemed unconstitutionally vague.[16] Just a few terms ago, in *Skilling v. United States*, the Court created its own limited definition of

8. *Skilling*, 561 U.S. at 415 (Scalia, J., concurring in part and concurring in the judgment).
9. U.S. CONST. amend. V, amend. XIV, § 1; Kolender v. Lawson, 461 U.S. 352, 353 (1983) (holding that insufficiently precise statute violates the Due Process Clause of the Fourteenth Amendment).
10. 461 U.S. 352 (1983).
11. *Id.* at 353–54.
12. Smith v. Goguen, 415 U.S. 566 (1974).
13. *Id.* at 582.
14. City of Chicago v. Morales, 527 U.S. 41 (1999).
15. *Id.* at 46–47.
16. *Id.* at 56.

"honest services" fraud based on the conclusion that a broader interpretation of the relevant federal statute posed a threat of unconstitutional vagueness.[17] And most recently, in *Johnson v. United States*,[18] the Court struck down as unconstitutionally vague a provision of the Armed Career Criminal Act that defined a violent felony as, inter alia, a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another."[19]

The Supreme Court has usually offered two reasons why a vague criminal statute violates the right to due process.[20] The first is that vague laws give insufficient notice to citizens about what conduct is permitted and what conduct is prohibited.[21] Without such notice, an individual may accidentally engage in illegal conduct.[22] As a consequence, in order to avoid conviction

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17. Skilling v. United States, 561 U.S. 358, 408–09 (2010).

18. 135 S. Ct. 2551 (2015).

19. 18 U.S.C. § 924(e)(2)(B)(ii) (2006) (defining a violent felony to include state or federal court convictions for any felony that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another"). According to the *Johnson* Court, several features of the provision make it difficult to estimate the risk posed by a defendant's previous crime, and it is thus unclear whether a conviction falls within the clause. *See* Johnson v. United States, 135 S. Ct. 2551, 2554 (2015). For one thing, because the mandatory minimum sentence is triggered by a *conviction* for a crime of violence, the Court has long held that whether a defendant's conviction falls within the residual clause must be determined by looking at the crime of conviction, not the underlying criminal conduct that resulted in the conviction. *See* Taylor v. United States, 495 U.S. 575, 600 (1990). This so-called categorical approach requires judges to assess the risk posed by the "ordinary case" of a defendant committing the crime, rather than the elements of a crime or the facts surrounding a particular defendant's crime. *Johnson*, 135 S. Ct. at 2558–59. For another, the list of enumerated crimes that precede the provision in question—burglary, arson, extortion, and crimes involving the use of explosives—further obscure the meaning of the provision. The listed crimes do not seem to create the same risk of injury to others. While arson and crimes involving explosives obviously involve a risk to others, burglary and extortion do not involve similarly obvious risk. Thus, if we read the residual clause's reference to "serious risk of potential injury" as incorporating the levels of risk from the enumerated crimes—and the word "otherwise" suggests we should—then the disparity of risk for the enumerated crimes makes it difficult to assess what level of risk is sufficient to qualify as "serious risk of potential injury." *Id.* at 2559.

20. *See*, *e.g.*, *Skilling*, 561 U.S. at 402–03 ("To satisfy due process, 'a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.'") (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)) (alterations in original); *see also* Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (offering the same two reasons).

21. "The [vagueness] doctrine incorporates notions of fair notice or warning." Smith v. Goguen, 415 U.S. 566, 572 (1974).

22. *Grayned*, 408 U.S. at 108 ("[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a

under vague statutes, citizens may choose to avoid large swaths of conduct that might be prohibited by the vague statute.[23] That is to say, not only are vague statutes a trap for the unwary, but they also may chill legal conduct.

The Court's concern about notice is not limited to the question whether particular conduct is legal or illegal. It also extends to questions of severity of punishment. *Johnson v. United States* provides an example. *Johnson* involved a federal statute that imposed a mandatory minimum sentence of fifteen years imprisonment on certain firearm offenders who had three previous convictions for a violent felony or a serious drug felony.[24] In declaring the statutory definition of "violent felony" void-for-vagueness, the Supreme Court confirmed that the void-for-vagueness doctrine applies "not only to statutes defining elements of crimes, but also to statutes fixing sentences."[25] In other words, the Court held that criminal statutes must provide the public notice regarding not only what conduct is legal or illegal but also what potential sanctions are attached to that conduct.[26]

The second rationale the Court has provided for striking down vague statutes is that vague statutes provide "insufficient standards for

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reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.").

23. United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 36 (1963) ("[W]e are concerned with the vagueness of the statute 'on its face' because such vagueness may in itself deter constitutionally protected and socially desirable conduct.") (citing Thornhill v. Alabama, 310 U.S. 88, 98 (1940).

24. Johnson v. United States, 135 S. Ct. 2551, 2554 (2015) (discussing the definition of "violent felony" in 18 U.S.C. § 924(e)(2)(B)).

25. *Id.* at 2557.

26. The Court had previously suggested that the vagueness doctrine applied to penalty provisions, as well as definitions of crimes, in *United States v. Batchelder*, 442 U.S. 114, 123 (1979) (stating that "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute"). But other opinions suggested the opposite. *See, e.g.*, Chapman v. United States, 500 U.S. 453, 467–68 (1991) ("The fact that there may be plausible arguments against describing blotter paper impregnated with LSD as a 'mixture or substance' containing LSD does not mean that the statute is vague. This is particularly so since whatever debate there is would center around the appropriate sentence and not the criminality of the conduct."). As a result, the United States had argued in its *Johnson* brief that the vagueness doctrine need not be applied with the same force in cases involving sentencing statutes, as opposed to statutes that define criminal conduct. Supplemental Brief for the United States at 17–18, Johnson v. United States, 135 S. Ct. 2551 (2015) (No. 13-7120) 2015 WL 1284964, at *17–18. Establishing that the vagueness doctrine unequivocally applies to penalty provisions is thus one important feature of *Johnson*. *See* Carissa Byrne Hessick, Johnson v. United States *and the Future of the Void-for-Vagueness Doctrine*, 10 N.Y.U. J.L. & LIBERTY 152, 161; Peter W. Low & Joel S. Johnson, *Changing the Vocabulary of the Vagueness Doctrine*, 101 VA. L. REV. 2051, 2112–14 (2015).

enforcement."[27] When a statute fails to give police and prosecutors a clear indication of what conduct is legal, the statute "vests virtually complete discretion in the hands" of law enforcement.[28] According to the Court, such unfettered discretion may result in "arbitrary and discriminatory enforcement"[29] because it "allows policemen, prosecutors, and juries to pursue their personal predilections."[30]

While these two concerns are offered in all of the recent vagueness cases, in a small handful of cases, the Court also mentioned that vague laws raise delegation problems.[31] For example, in *United States v. L. Cohen Grocery Co.*, the Court noted that standardless statutes "delegate legislative power."[32] And in *Grayned v. City of Rockford*, the Court stated: "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries

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27. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 503 (1982).

28. Kolender v. Lawson, 461 U.S. 352, 358 (1983); *see also* Smith v. Goguen, 415 U.S. 566, 578 (1974) (remarking on the "the unfettered latitude thereby accorded law enforcement officials and triers of fact" under a vague statute).

29. *Goguen*, 415 U.S. at 573.

30. *Id.* at 575.

31. *See* Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 284–86 (2003) (collecting cases on the delegation issue and noting that the "principle, that the separation of powers must be maintained, stood for decades as the second requirement of vagueness analysis"). The restriction on delegation ordinarily is understood to be a structural limitation, rather than to derive from personal rights like the right to due process. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 487 (2001) (Thomas, J., concurring in the judgment) (questioning whether the Court's "delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers"); Mistretta v. United States, 488 U.S. 361, 371 (1989) ("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government."). Perhaps one could argue that prohibiting delegation has the indirect effect of protecting individual liberty by diffusing power, but the Supreme Court has not made that argument in stating that vague statutes constitute impermissible delegations.

32. United States v. L. Cohen Grocery Co., 255 U.S. 81, 92 (1921). Similarly, in United States v. Reese, 92 U.S. 214, 221 (1875), the Court stated:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government . . . .
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> To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.

Id.

for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[33]

Grayned raised the specter of arbitrary enforcement when it identified the delegation concern, and commentators often link the issue of delegation with the issue of discretion.[34] Although the concerns are related, the two concepts are distinct.[35]

Delegation, as used in this context, refers to the transfer of power over policy from the legislature to another body.[36] Discretion, on the other hand, is the power to choose between possible outcomes. It need not include the authority to set policy.[37] Take, for example, the classic case of prosecutorial discretion—the question whether to file charges against an individual. A prosecutor may have probable cause to believe that a particular person committed a crime, but the prosecutor may believe that the evidence in the particular case is not very strong, and, thus, that she is unlikely to persuade a jury to convict the defendant. Although the prosecutor certainly has the discretion to decide not to pursue charges,[38] that discretion is not the product of a delegation from the legislature to the prosecutor.[39]

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33. Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972).

34. *See, e.g.*, Forde-Mazrui, *supra* note 5, at 1539–48 (discussing "legislative delegation of excessive discretion").

35. *Cf.* Goldsmith, *supra* note 31, at 288 ("As the doctrine of arbitrary enforcement rose in importance, the focus on maintaining the separation of powers [by policing delegations] waned.").

36. *See, e.g.*, Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1039 (2007) (describing a "conventional" delegation as authorizing "someone other than Congress to issue binding directives"); *see also Delegation*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The act of entrusting another with authority or empowering another to act as an agent or representative . . . ."); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2099 (2004) (equating the delegation of "legislative power" to the granting of "unconstrained discretion in making rules").

37. Discretion is the power of free decision and individual choice. There are two major forms of discretion. The first, explicit discretion, confers authority on an actor to choose between different outcomes. When a law is phrased in terms of a flexible standard, rather than a bright line rule, for example, it confers discretion on those tasked with enforcing it. The second type of discretion, de facto discretion, involves the reviewability of decisions. The law confers de facto discretion on an actor when it insulates that actor's decisions from subsequent review. *See* Carissa Byrne Hessick & F. Andrew Hessick, *Procedural Rights at Sentencing*, 90 NOTRE DAME L. REV. 187, 196–98 (2014).

38. That is to say, she possess both explicit and de facto discretion. She has the authority to make the decision whether to file charges, and her decision is not subject to review. *See supra* note 37.

39. One might say that the power was delegated to the prosecutor by the Constitution, which states that the Executive "shall take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3.

Because discretion and delegation are not equivalent concepts,[40] the question remains how to distinguish between the discretion conferred by vague laws and the delegation from the legislature to the executive under those laws. *Grayned* frames the concern as a delegation of "basic policy matters."[41] Those commenters who have distinguished the delegation concern from the arbitrary and discriminatory enforcement concern have also focused on the transfer of policy power from the legislature to the executive. For example, in explaining how vague statutes delegate lawmaking authority to the executive, Nathan Chapman and Michael McConnell have expressed the concern that the executive will interpret the vague statute in light of the executive's unstated policy goals rather than in light of the legislature's policy directives.[42] Consequently, it seems fair to conclude that the non-delegation principle underlying the vagueness doctrine is a concern that vague laws allow law enforcement and fact finders to pursue their own policy agenda.

III. VAGUENESS PRINCIPLES AND NON-VAGUE STATUTES

This Part explains how vagueness principles are often threatened in cases involving arrests and prosecutions under even non-vague statutes. That is to say, it explains how the enforcement of non-vague laws can result in a lack of notice, lead to arbitrary and discriminatory enforcement, and represent an unwarranted delegation. The section begins by describing the current state of criminal codes and criminal prosecutions, focusing on the enactment of broad, overlapping criminal codes and the significant enforcement discretion given to prosecutors. It then explains how these features result in a lack of notice, permit arbitrary and discriminatory enforcement, and delegate power policy power from the legislature to the executive in the enforcement of non-vague statutes.

For those who are familiar with the criminal justice system, the criticisms in the first half of this Part will come as no surprise. Much has been written on the modern expansion of criminal codes, and even more has been written about the unchecked power of prosecutors in charging and plea bargaining. But the aim of this Part is not simply to rehash those criticisms, it is instead

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40. *But cf.* Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 235–37 (2005) (arguing that the nondelegation principle places limits on the extent to which Congress can grant discretion to others, and thus equating improper delegations with undue discretion).

41. Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972).

42. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1806 (2012).

to describe these features of the modern criminal justice system for a particular end—namely, to demonstrate how the same problems associated with vague statutes are present in arrests and prosecutions under statutes that, when viewed in isolation, are not vague.

A. The Current State of Criminal Codes and Criminal Prosecutions

Criminal codes have exploded in modern times. New crimes are added to criminal codes at an astounding rate.[43] Federal criminal law now includes more than four thousand crimes, and there have been significant increases in the number of crimes at the state level.[44] This criminal code expansion, which is often referred to as "overcriminalization," has several consequences—two of which are relevant to this discussion. First, criminal codes have expanded to prohibit behavior that is not obviously wrongful. Second, codes now contain multiple, overlapping statutes.

New criminal provisions sometimes prohibit conduct that was previously permitted.[45] But the reach of criminal codes may also expand without the enactment of new laws; it can expand if existing laws include qualitative standards. Those standards allow those who enforce the laws to determine what is illegal. Consider, for example, the various state child neglect and child endangerment statutes that criminalize putting a child "at risk."[46] As parenting has become more overprotective in various communities, parents who allow their children to play or walk to school unsupervised—activities that were entirely acceptable fifteen or twenty years ago—may find themselves charged with child neglect or child endangerment.[47]

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43. *See* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 713 (2005); Julie R. O'Sullivan, *The Federal Criminal "Code" is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 648–49 (2006).

44. Luna, *supra* note 43.

45. Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 78 (1998).

46. *See, e.g.*, MICH. COMP. LAWS § 722.622(k)(ii) (2016) (defining "child neglect" to include "[p]lacing a child at an unreasonable risk to the child's health or welfare by failure of the parent, legal guardian, or other person responsible for the child's health or welfare to intervene to eliminate that risk when that person is able to do so and has, or should have, knowledge of the risk"); *see also* MONT. CODE ANN. § 41-3-102(20) (2015) (defining "physical neglect" of a child to include "exposing or allowing the child to be exposed to an unreasonable physical or psychological risk to the child").

47. For a thoughtful treatment of this issue, see David Pimentel, *Criminal Child Neglect and the "Free Range Kid": Is Overprotective Parenting the New Standard of Care?*, 2012 UTAH L. REV. 947 (2012).

Another feature of the modern expansion of criminal codes is that many new statutes are directed at behavior that is already illegal.[48] Although the penalties associated with new crimes may differ, the scope of these new statutes usually overlap, either in full or in part, with existing crimes. Consider the multitude of federal statutes aimed at false statements. Title 18 U.S.C. § 1001 criminalizes the making of "any materially false, fictitious, or fraudulent statement or representation" regarding "any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States." This crime is punishable by up to five years in prison.[49] Despite the broad sweep of 18 U.S.C. § 1001,[50] Congress has also enacted statutes aimed at false statements to government officials in various specific contexts, including the entry of goods into the United States (punishable by up to two years in prison),[51] fishing (civil penalty of up to $100,000),[52] loans and mortgages (up to two years in prison),[53] applications for passports (up to twenty-five years in prison),[54] naturalization and citizenship (up to five years in prison),[55] and health care benefits (up to five years in prison).[56] And this is hardly a complete list. A 1998 study found that there were 642 separate sections in the federal criminal code pertaining to offenses involving false statements to government officials.[57]

The expansion of criminal codes described above gives enormous power to police and prosecutors. This power takes many different forms. Because the criminal law prohibits large swaths of conduct, laws cannot be enforced in all circumstances. If law enforcement do not have the resources to pursue charges in all circumstances—and in modern criminal systems, they most certainly do not[58]—then law enforcement must decide how to use those limited resources.[59] One resource decision involves how to prioritize different

48. *See, e.g.*, Luna, *supra* note 43, at 708.

49. 18 U.S.C. § 1001(a) (2012).

50. For an example of how broadly this statute has been interpreted, see *United States v. Rogers*, 466 U.S. 475, 479–84 (1984).

51. 18 U.S.C. § 542.

52. 16 U.S.C. § 1857(1)(I) (2012); 18 U.S.C. § 1858(a).

53. 18 U.S.C. § 1010.

54. *Id*. § 1542.

55. *Id*. § 1015.

56. *Id*. § 1035.

57. *See* Gainer, *supra* note 45, at 62.

58. *See* O'Sullivan, *supra* note 43, at 654 ("The breadth of the penal laws subject to federal sanction all but ensures that federal enforcement officials, despite substantial increases in funding in the last few decades, will be unable to enforce them all.").

59. *See* Robert Jackson, *The Federal Prosecutor*, 31 AM. INST. CRIM. L. & CRIMINOLOGY 3, 5 (1940) ("One of the greatest difficulties of the position of prosecutor is that he must pick his

crimes. Some priorities are obvious—most (if not all) jurisdictions will devote resources to investigating and prosecuting murders rather than to investigating and prosecuting jaywalking. Other priorities are less obvious. Law enforcement must decide, for example, whether to devote more resources to investigating and prosecuting theft or fraud. And for those crimes that begin as law-enforcement-initiated investigations (rather than from victim complaints), such as drug prosecutions, priority decisions are driven almost entirely by the personal and institutional preferences of law enforcement. Depending on the institutional priorities of law enforcement, some laws are essentially unenforced.

Not only must police and prosecutors decide which categories of crimes to pursue, they must also decide which individuals to arrest and which to prosecute. Prosecutors cannot possibly prosecute all violations of every law. In order to avoid leaving large swaths of the criminal code unenforced, for many laws, prosecutors often pursue charges against only some small fraction of individuals violating those laws. In other words, police and prosecutors must decide which law-breakers to pursue, and which to ignore. As Kenneth Culp Davis explained, this situation necessarily gives rise to selective enforcement.[60] Sometimes the criteria used by law enforcement to make those selective enforcement determinations will seem neutral and fair—such as when a DUI checkpoint stops every fourth vehicle on a particular road. Other times individual enforcement determinations will seem less fair—such as when law enforcement targets only downscale markets in drugs and prostitution.[61] And some individual enforcement determinations may be based on obviously problematic criteria, such as personal animosity or membership in an unpopular group.[62]

After deciding which individuals to prosecute, a prosecutor must then decide which charges to bring. The selection of charges is one of a prosecutor's most significant powers. In enacting overlapping laws that cover

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cases, because no prosecutor can even investigate all of the cases in which he receives complaints.").

60. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 162–63 (1971).

61. As Bill Stuntz has explained, enforcement efforts in upscale markets are likely to yield fewer arrests than similar efforts in downscale markets. Thus, while concentrating enforcement efforts in low-income neighborhoods may appear to be motivated by racial bias, there may be resource-driven, race-neutral explanations for those decisions. William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1804–15 (1998).

62. *See* Jackson, *supra* note 59 (identifying as "the most dangerous power of the prosecutor . . . that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted").

the same conduct, the legislature has given broad discretion to prosecutors to treat similarly situated individuals differently.[63] Consider, for example, the situation in *United States v. Batchelder*.[64] *Batchelder* involved the prosecution of a felon in possession of a firearm in violation of federal law. On two separate occasions, Congress had enacted statutes prohibiting the possession of a firearm by an individual who had previously been convicted of a felony.[65] One statute provided for a maximum punishment of two years in prison, the second for a maximum punishment of five years in prison. A prosecutor convicted Batchelder under the second statute, and the trial court sentenced him to five years in prison.[66] Batchelder appealed, arguing, inter alia, that prosecutors should not be given the power to choose between overlapping statutes. The Supreme Court rejected this argument, stating that if "an act violates more than one criminal statute, the Government may prosecutes [sic] under either so long as it does not discriminate against any class of defendants. Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion."[67]

The power to choose between different punishments is not the only advantage that overlapping statutes give to prosecutors. Overlapping statutes allow prosecutors to bring multiple charges under different statutes for the same conduct. This so-called "stacking" of charges allows a prosecutor to obtain multiple convictions for a defendant who committed a single criminal act. Those multiple convictions can increase the defendant's punishment exposure, depending on jurisdictional rules about running sentences consecutively or concurrently.[68]

These charging choices also contribute to prosecutors' already sizable advantage in the plea bargaining process. Prosecutors may offer to drop stacked charges in exchange for a guilty plea, or they may offer to accept a guilty plea to a lesser charge. A prosecutor's ability to charge bargain is not limited to dismissing charges that have already been brought. A prosecutor

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63. *See* O'Sullivan, *supra* note 43, at 646 (noting "prosecutors' vast discretion in selecting among elastic and redundant code provisions").

64. United States v. Batchelder, 442 U.S. 114 (1979).

65. *See id.*

66. *Id.* at 116.

67. *Id.* at 123–24 (citations omitted).

68. The effects of stacking charges may, in some circumstances, be ameliorated by the Double Jeopardy Clause. U.S. CONST. amend. V. As it is currently interpreted, the clause allows multiple convictions and multiple punishments for a single criminal act only if each statute of conviction has at least one element that the other statutes do not. *See* Blockberger v. United States, 284 U.S. 299, 304 (1932).

may also threaten to bring additional charges if a defendant will not agree to plead guilty to existing charges. This was the situation in *Bordenkircher v. Hayes*.[69] The prosecutor in that case wanted Hayes, who forged a check for $88.30, to plead guilty to a charge of "uttering a forged instrument" in return for a sentencing recommendation of five years in prison.[70] The prosecutor told Hayes that, if he did not plead guilty, then he would re-indict him under the state's habitual offender statute, which carried a mandatory life sentence for anyone convicted of three felonies (Hayes had two previous convictions). Hayes refused the plea bargain, the prosecutor re-indicted, the jury convicted, and Hayes was sentenced to life in prison.[71] The Supreme Court rejected Hayes' argument that the prosecutor's actions violated the Due Process Clause, reasoning that if "the accused is free to accept or reject the prosecution's offer," then there is no due process violation.[72] The Court went on to defend the prosecutor's actions, stating "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."[73]

Law enforcement actors enjoy tremendous discretion, not only because these decisions have been delegated to them, but also because the decisions are essentially unreviewable.[74] Interfering with a prosecutor's discretion, the Supreme Court tells us, infringes on "a 'special province' of the Executive," who has been given the "constitutional responsibility to 'take Care that the Laws be faithfully executed.'"[75]

To be sure, courts have not said that prosecutorial decisions are completely unreviewable. They may be reviewed to ensure that criminal laws are not enforced "based upon an unjustifiable standard such as race, religion, or other arbitrary classifications."[76] Thus, as a matter of doctrine, police and

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69. Bordenkircher v. Hayes, 434 U.S. 357 (1978).

70. *Id.* at 358.

71. *See Hayes*, 434 U.S. at 358–59; *see also* William J. Stuntz, Bordenkircher v. Hayes*: Plea Bargaining and the Decline of the Rule of Law*, *in* CRIMINAL PROCEDURE STORIES 351–53 (C.S. Steiker ed., 2006).

72. *Hayes*, 434 U.S at 363.

73. *Id*. at 364.

74. That is to say, the modern criminal justice system gives two types of discretion to law enforcement officers: It confers on law enforcement the authority to use their judgement in choosing between possible outcomes, and it insulates that judgment from subsequent review. For more on these two types of discretion, see Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 754–55 (1982); Hessick & Hessick, *supra* note 37, at 196–98.

75. United States v. Armstrong, 517 U.S. 456, 464 (1996) (quoting Heckler v. Chaney, 470 U.S. 821, 832 (1985); U.S. CONST. art. II, § 3).

76. Oyler v. Boles, 368 U.S. 448, 456 (1962).

prosecutors may not make decisions that are motivated by either a defendant's membership in a suspect class, such as a particular race or religion, or a desire to interfere with a defendant's constitutional rights.[77]

But other decisions have severely limited the ability of individuals to prove that law enforcement has acted with unconstitutional motives.[78] Thus, as a practical matter, law enforcement officers may target defendants for unconstitutional motives without real fear of redress.[79]

The most well-known limitation on the ability to prove unconstitutional enforcement is a limitation on discovery. In *United States v. Armstrong*,[80] the Supreme Court held that a "rigorous standard of discovery" was necessary for selective prosecution cases.[81] In particular, the *Armstrong* Court held that, in order to obtain discovery, the defendants first needed to "prove that persons of other races were being treated differently."[82] As others have noted, the evidence that the *Armstrong* opinion appears to require is not available in many selective prosecution cases.[83]

As the preceding paragraphs explain, the current state of criminal codes and criminal prosecutions concentrate a large amount of power in the hands of law enforcement generally, and prosecutors in particular. Decisions about which crimes to prioritize, which individuals to prosecute, which charges to bring, and whether and how to plea bargain are not only delegated to law enforcement, but they are effectively unreviewable in most cases. As the next section explains, the consequence of this arrangement is that the same concerns that the courts have identified in the vagueness doctrine also arise in the enforcement of non-vague statutes.

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77. Reiss, *supra* note 7 (collecting cases). Reiss also notes that lower courts have occasionally held that personal animosity towards the defendant is an inappropriate basis for prosecution. *Id.* at 1452 (collecting cases).

78. Recent cases also severely limit an individual's ability to seek redress even when such proof is available. *See, e.g.*, Hartman v. Moore, 547 U.S. 250 (2006) (holding that, if an individual brings a *Bivens* action claiming that she was prosecuted in retaliation for exercising her constitutional rights, her complaint must be dismissed unless she can prove that the prosecution was not supported by probable cause).

79. *See* Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of* Armstrong, 73 CHI.-KENT L. REV. 605, 623 (1998) ("[F]or many crimes, *Armstrong* makes discovery impossible even where the defendant is a victim of selective prosecution.").

80. United States v. Armstrong, 517 U.S. 456 (1996).

81. *Id.* at 468.

82. *Id.* at 470.

83. The Court faulted the defendants for having failed to investigate "whether similarly situated persons of other races were prosecuted by the State of California and were known to federal law enforcement officers, but were not prosecuted in federal court." *Id.* As others have noted, that showing is possible only in cases when defendants assert that similarly situated white offenders are being prosecuted in state courts, where they are being punished under laws that impose lighter sentences. *See* McAdams, *supra* note 79, at 616–18.

B. Vagueness Principles in Individual Prosecutions

As a result of the expansive criminal codes and broad prosecutorial discretion identified in the previous section, enforcement of non-vague laws often create the same problems as the enforcement of vague statutes. The breadth of criminal laws and prosecutorial discretion result in the public having insufficient notice, lead to arbitrary and discriminatory enforcement, and represent an unwarranted delegation by the legislature.

1. Notice Concerns

One of the major concerns that the Supreme Court has raised in the context of vague statutes is that such statutes fail to give individuals sufficient notice. In order to withstand a vagueness challenge, criminal statutes must provide notice regarding not only what conduct is legal or illegal, but also what potential sanctions are attached to specific illegal conduct.[84]

The modern criminal justice system often fails to give individuals sufficient notice regarding the potential penalties that they face for engaging in criminal conduct. This lack of notice is a product of overlapping statutes and prosecutorial discretion. As noted above, when charging an individual who has engaged in illegal conduct, prosecutors often may choose among multiple criminal charges that would apply to the same conduct.[85] Prosecutors regularly make these choices either on an ad hoc basis or based on criteria that are not publicly disclosed. The public does not know which charges the prosecutor is likely to choose, and thus they do not know what penalty they will face for engaging in the prohibited conduct.[86]

Consider, for example, the current federal regime that governs possession of child pornography. The federal code prohibits the receipt and possession of child pornography. But receipt carries a mandatory minimum sentence,[87] while possession does not.[88] Although receipt and possession are distinct crimes—that is to say, they have different elements—in essentially every case an individual who possesses child pornography could be charged with

84. *See* Johnson v. United States, 135 S. Ct. 2551, 2557 (2015).

85. *See supra* text accompanying notes 63–73.

86. Edward Cheng has made a related but distinct argument—namely, that when laws are underenforced, then "[c]itizens receive little or no notice as to what constitutes unlawful (as in 'sanctionable') conduct." Edward K. Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100 NW. U. L. REV. 655, 661 (2006).

87. 18 U.S.C. § 2252(b)(1) (2012).

88. *Id.* § 2252(b)(2).

receipt.[89] Thus, one of the major decisions facing a prosecutor in a child pornography possession case is whether to seek a mandatory minimum by charging a defendant with receipt of child pornography instead of possession. The public does not know the circumstances under which the prosecutor will choose to bring possession or receipt charges, and thus they do not know whether they will face the mandatory minimum if they possess child pornography.[90]

This child pornography example is, in many ways, similar to the situation in *Johnson v. United States.* In that case, a federal statute imposed a mandatory minimum sentence of fifteen years imprisonment on certain firearm offenders who had three previous convictions for a violent felony or a serious drug felony.[91] The statute defined the term "violent felony," but that definition was imprecise. Therefore, the public did not know whether they would be subject to the mandatory minimum or not until the prosecutor brought criminal charges. And even if the prosecutor did elect to pursue the mandatory minimum, there was still a question whether the judge would agree with the prosecutor about how to interpret the imprecise statute and thus whether the mandatory minimum applied.

There is, of course, a significant difference between the statute in *Johnson* and the child pornography statute. While the defendant in *Johnson* did not know whether the written statute applied to him as a matter of law, a child pornography defendant knows that both statutes apply but does not know which charges he will face. In other words, in *Johnson* it was unclear whether the prosecutor had the legal authority to bring the mandatory minimum charges, while the child pornography defendant simply cannot predict which of the two authorized charges a prosecutor will choose.

But it is hard to see how this distinction matters as a matter of notice. Notice focuses on the information available to the defendant,[92] and in both

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89. One possible exception is an individual who inadvertently came into possession of child pornography images, discovered the images, and then decided to keep them. That person would be guilty of knowing possession, but not knowing receipt.

90. Indeed, a recent report by the United States Sentencing Commission confirms that prosecutors are making this decision in an arbitrary fashion. The Commission's exhaustive study of a large set of child pornography cases revealed no apparent criteria distinguishing those defendants who were charged with receipt from those defendants who were charged only with possession. *See* U.S. SENTENCING COMM'N, FEDERAL CHILD PORNOGRAPHY OFFENSES 144–67 (2012).

91. United States v. Johnson, 135 S. Ct. 2551, 2555 (2015).

92. "A person has notice of a fact or condition if that person (1) has actual knowledge of it; (2) has received information about it; (3) has reason to know about it; (4) knows about a related fact; or (5) is considered as having been able to ascertain it by checking an official filing or recording." *Notice*, BLACK'S LAW DICTIONARY (10th ed. 2014).

situations the defendant cannot predict what the criminal penalty will be. The mandatory minimum sentence might apply or it might not; we do not know until the prosecutor has filed charges. Of course, in the *Johnson* case, the prosecutor's charging decision was not the only determining factor; it also mattered whether the judge agreed with the prosecutor's reading of the statute. But that does not change the defendant's ex ante position of ignorance—before engaging in the conduct, whether it is possessing a firearm or possessing child pornography, the defendant does not know whether the mandatory minimum sentence will apply in her case.

The Supreme Court has acknowledged and dismissed this notice argument. "So long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied," the Court declared in *United States v. Batchelder*.[93] That an individual does not know which crime will be charged and thus which penalty will apply was irrelevant, according to the Court, because this uncertainty is no greater than the uncertainty created by "a single statute authorizing various alternative punishments."[94] It is not clear what the Court meant by "a single statute authorizing various alternative punishments."[95] One possible reading is that the selection between two crimes with different penalty ranges is no different than having a single statute that authorizes a range of punishments. (In *Batchelder*, for example, the prosecutor was able to charge the defendant either under a statute with a punishment range of zero to two years in prison or under a statute with a punishment range of zero to five years in prison. Thus, in that case, the range of the single, hypothetical statute would have been zero to five years imprisonment.)

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93. 442 U.S. 114, 123 (1979).

94. *Id.* ("Although the statutes create uncertainty as to which crime may be charged and therefore what penalties may be imposed, they do so to no greater extent than would a single statute authorizing various alternative punishments.").

95. Nor is such an explanation to be found in the parties' briefs. The brief of the United States in *Batchelder* argued that overlapping statutes are not void-for-vagueness because "[c]riminal statutes commonly overlap . . . such overlaps are to some extent desirable," and if statutes were vague simply because they were overlapping then "the federal and state criminal codes would be riddled with void provisions." Brief for United States at 32–33, United States v. Batchelder, 442 U.S. 114 (1979) (No. 78-776) 1979 WL 213892, at *32. In other words, the government did not address the notice issue on its merits, but rather it articulated policy reasons why overlapping statutes serve law enforcement ends, and then it warned the Court that a defense ruling would create a floodgates problem, opening up many convictions to constitutional challenge.

That reasoning is highly suspect after *Apprendi v. New Jersey*[96] and *Alleyne v. United States*.[97] Those decisions explain that changing the range of punishment to which a defendant is exposed triggers a series of procedural protections. And *Johnson* confirms that one of those procedural protections is the due process prohibition against vagueness. The statute in *Johnson* prescribed alternative punishments—one punishment for everyone who illegally possessed a firearm, and a higher punishment for those who possessed a firearm and had three prior convictions for a "crime of violence."[98] The Supreme Court made clear that the circumstances which triggered the higher punishment had to be articulated in a manner that gave notice to defendants whether they were eligible for the higher punishment.[99] It was not enough that the public knew that, if they had three prior convictions, those convictions might qualify as a crime of violence.

More fundamentally, the lack of notice arising from overlapping statutes is equivalent to the lack of notice under vague statutes because if a legislature were to explicitly delegate the penalty selection to prosecutors, then the resulting statute would almost certainly be void-for-vagueness. That is to say, a statute providing alternative punishments and then explicitly stating that the prosecutor may choose between those punishments at his or her discretion would almost certainly not be permitted under the vagueness doctrine.

Returning to the *Batchelder* example, imagine that, instead of enacting two statutes with alternative punishments, Congress enacts a single statute. The hypothetical statute states that persons who violate that statute may be sentenced either up to two years in prison or up to five years in prison "depending on which sentencing range the prosecutor deems appropriate." Such a statute would be void-for-vagueness because what "the prosecutor deems appropriate" provides insufficient notice about what penalty will apply.[100] It seems odd to prohibit legislatures from enacting a statute that

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96. Apprendi v. New Jersey, 530 U.S. 466 (2000).

97. Alleyne v. United States, 133 S. Ct. 2151 (2013).

98. *Compare* 18 U.S.C. § 924(a)(2) (2006) (setting the punishment range for violation of various crimes, including 18 U.S.C. § 922(g), at "not more than 10 years" imprisonment), *with* 18 U.S.C. § 924(e) (2006) (setting the punishment range for a violation of 18 U.S.C. § 922(g) at "not less than fifteen years" imprisonment if the defendant "has three previous convictions by any court . . . for a violent felony or a serious drug offense").

99. Johnson v. United States, 135 S. Ct. 2551, 2557 (2015).

100. As James Vorenberg described this problem:

> No uniform, pre-announced rules inform the defendants and control the decisionmaker; a single official can invoke society's harshest sanctions on the basis of ad hoc personal judgments. Prosecutors can and do accord different treatment—prison for some and probation or diversion to others—on grounds

explicitly leaves the choice of penalty to the prosecutor, yet permit legislatures to accomplish that goal implicitly by enacting overlapping statutes.

2. Discretion Concerns

The second vagueness concern courts have identified is that police and prosecutors may use their discretion under vague statutes to enforce laws in arbitrary or discriminatory ways. But the discretion that law enforcement currently possesses under non-vague laws can also easily be exercised in an arbitrary and discriminatory fashion. Indeed, in *Bordenkircher v. Hayes*, the Court stated: "There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse."[101] Several commentators also have noted that the modern criminal justice system regularly confers similar or the same amount of discretion on law enforcement as that conferred by vague statutes.[102]

Consider, for example, the statute at issue in *Kolender v. Lawson*.[103] That statute required persons who loiter or wander on the streets to provide "credible and reliable" identification whenever requested by the police.[104] The Supreme Court found the standard "credible and reliable" to be impermissibly vague, and it struck down the law in part because it was concerned that police officers on the street were given too much latitude in determining what type of identification would meet this standard. Of course, police discretion was not unlimited. Carrying a valid state driver's license, for example, would doubtlessly satisfy the standard, and so police could not arrest an individual who produced a driver's license.[105] But an individual who could, for example, only produce a library card would be at the mercy of police discretion.

> that are not written down anywhere and may not have been either rational, consistent, or discoverable in advance.

James Vorenberg, *Decent Restrain of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1554 (1981); *see also* Stuntz, *supra* note 71, at 378 ("The *real* law, the 'rules' that determine who goes to prison and for how long, is not written in code books or case reports. Prosecutors . . . define it by the decisions they make when ordering off the menus their state legislatures have given them.").

101. Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978).

102. *See, e.g.*, Forde-Mazuri, *supra* note 5, at 1500–05; Low & Johnson, *supra* note 26, at 2053; Maclin, *supra* note 5, at 400–03; Stuntz, *Pathological*, *supra* note 6, at 559–61.

103. 461 U.S. 352 (1983).

104. *Kolender*, 461 U.S. at 353.

105. *See id.*

Law enforcement has similar discretion when enforcing non-vague laws. Consider, for example, a common narrative surrounding traffic stops. Police will identify a vehicle that they suspect is being used for illegal activity, such as drug trafficking. Police will follow that vehicle until it commits a minor traffic violation, and then police will pull over the vehicle and use the traffic stop as a pretext to investigate for drug trafficking. Of course, not every single vehicle will necessarily commit a traffic violation. But traffic violations are so common that police regularly use this tactic. It may not allow police to stop every car—just as the *Kolender* statute did not allow police to arrest every individual. But the proliferation of traffic violations, combined with the fact that most drivers will commit an infraction if observed for any appreciable amount of time, gives police at least as much discretion as they possessed in *Kolender*.[106]

This wide discretion—and the potential for abuse—is not limited to traffic violations. Significant discretion exists simply because there are so many laws from which police and prosecutors can choose. As then-Attorney General Robert Jackson explained:

> With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him.[107]

The quantitative and qualitative studies in this area suggest that enforcement decisions are often arbitrary or discriminatory. Some of the factors which appear to influence charging and bargaining are uncontroversial.[108] Prosecutors regularly make decisions based on the seriousness of the crime, the seriousness of the defendant's criminal history,

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106. As Bill Stuntz astutely observed, drivers who drive at the posted speed limit will draw the ire of other drivers because "[i]n the United States, posted limits don't define the maximum speed of traffic; they define the *minimum* speed. So who or what determines the real speed limits? The answer is: whatever police force patrols the relevant road. Law enforcers—state troopers and local cops—define the laws they enforce." STUNTZ, *supra* note 5.

107. Jackson, *supra* note 59.

108. Because prosecutors' decisions are so low-visibility, it is difficult to know what decisions prosecutors are making, let alone why they are making them. In addition, "prosecutors are hardly homogenous," and thus their personal goals and priorities will not necessarily overlap. *See* Leonard R. Mellon et al., *The Prosecutor Constrained by His Environment: A New Look at Discretionary Justice in the United States*, 72 J. CRIM. L. & CRIMINOLOGY 52, 53 (1981)

and the strength of the evidence.[109] But there are other, more controversial factors that sometimes influence law enforcement decisions.[110] For example, the personal relationship between the victim and the offender can often influence law enforcement: the closer the existing the relationship, the more likely the prosecutor is not to pursue charges or to offer a lenient plea deal to the defendant.[111] Police and prosecutors appear to employ different criteria for deciding whether to arrest or prosecute male versus female offenders.[112] And they are more likely to pursue charges in situations where the victim is seen as "worthy."[113]

The danger of arbitrary and discriminatory enforcement is particularly significant in prosecutions involving statutes with qualitative standards. The decision whether a defendant's conduct satisfies one of these qualitative standards, as a practical matter, rests entirely with law enforcement. A defendant may believe that her conduct does not satisfy the standard, but the only way to challenge the prosecutor's decision—that is to say, the prosecutor's interpretation of the statute—is to go to trial.[114] "Yet the cost

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109. *See id.* at 77; *see also id.* at 69–70 (reporting the practices in one prosecutor's office not to offer lenient plea bargains for "high impact crimes such as rape, robbery, or residential burglary"); Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 262 (1980) (reporting the most common reasons for federal declination of charges, namely the "state-prosecution alternative" and "small amount of loss by the victims; small amount of contraband, such as drugs or guns; the isolated nature of the defendant's act; and insufficient evidence of a criminal act").

110. To be clear, that some prosecutors exercise their discretion according to these policy goals does not mean that these are universal goals of prosecutors. *See supra* note 108.

111. *See* DONALD BLACK, THE BEHAVIOR OF LAW 44 (1976); Carissa Byrne Hessick, *Violence Between Lovers, Strangers, and Friends*, 85 WASH. U. L. REV. 343, 349–58 (2007); Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691 (2006).

112. Cynthia Godsoe, *Punishment as Protection*, 52 HOUS. L. REV. 1313, 1372–77 (2015) (describing the different treatment of female juvenile offenders as compared to male juvenile offenders); *see also* MEDA CHESNEY-LIND & RANDALL G. SHELDEN, GIRLS, DELINQUENCY, AND JUVENILE JUSTICE 200 (3d ed. 2004).

113. This is particularly prevalent in sexual assault cases. Prosecutors will often assess a victim's morality or risk-taking behaviors in deciding whether to file charges in those cases, and they are less likely to bring charges in cases where the victim engaged in risky behavior or is perceived as morally questionable. *See* Dawn Beichner & Cassia Spohn, *Prosecutorial Charging Decisions in Sexual Assault Cases: Examining the Impact of a Specialized Prosecution Unit*, 16 CRIM. JUST. POL'Y REV. 461 (2005). In fact, some research suggests that a victim's risk-taking behaviors are more influential in a case than physical evidence. *Id.* at 479; *see also* Cassia Spohn et al., *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the "Gateway to Justice,"* 48 SOC. PROBS. 206, 226 (2001).

114. To be sure, a defendant might be able to seek a declaratory judgment, clarifying that her conduct is legal. *See* 28 U.S.C. § 2201(a) (2012); *see also* Zwickler v. Koota, 389 U.S. 241, 252 (1967). But that option ordinarily is available only before criminal charges are filed. *See*

and, more importantly, the risk of greater sentence that trials entail will generally deter defendants from exercising this option."[115] To be clear, this dynamic allows prosecutors to obtain guilty pleas even when a defendant's behavior appears to fall well outside of the relevant statutory language. There are many examples of prosecutors obtaining guilty pleas under such circumstances.[116]

3. Delegation

The final principle that underlies the vagueness doctrine is a prohibition on policy delegation. The Supreme Court has stated that "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis."[117] But comparable delegation over basic policy matters can be seen outside the context of vague laws.[118] Statutes with qualitative standards delegate significant policy authority to prosecutors, and prosecutors can also pursue their own policy agendas when deciding when to enforce any law.[119]

A comparison may be useful here. Consider the statute at issue in *United States v. L. Cohen Grocery Co.*,[120] one of the cases in which the Supreme Court expressed concern about the delegation of legislative authority by vague laws.[121] That statute criminalized the setting of an "unjust or unreasonable rate or charge in handling or dealing in or with any

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Declaratory Relief in the Criminal Law, 80 HARV. L. REV. 1490, 1503–04 (1967); *see also* Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1141–42 (2014).

115. Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 762 (1999).

116. *See, e.g.*, Erica Goode, *Crime & Punishment in YouTube Generation: Michigan Town Is Divided by a Comedy Video that Paired Schoolchildren and a Sexually Explicit Song*, HOUS. CHRON., Mar. 13, 2011, at A23 (reporting that a defendant had been charged with "manufacturing and distributing child pornography" for editing a video "to make it appear that elementary school children in a local classroom were listening to him sing a song with graphic sexual lyrics").

117. Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972).

118. *E.g.*, Richman, *supra* note 115, at 761 (stating that the result of Congress's decision to "eschew[] legislative specificity" in the area of federal criminal law "has been to transfer a considerable degree of lawmaking authority to the other branches of government").

119. Adam Cox and Cristina Rodríguez have termed this transfer of policy power "de facto delegation," noting that "it would be passing strange to argue that the myriad discretionary decisions made by law enforcement officials should always be motivated and constrained *solely* or even primarily by the value judgments those officials can trace to a code enacted by Congress." Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 108, 110 (2015).

120. 255 U.S. 81 (1921).

121. *Id.* at 92 (noting that standardless statutes "delegate legislative power").

necessaries."[122] The statute did not explain what constitutes an unjust or unreasonable rate, nor did it explain what factors ought to be considered in assessing unreasonableness. As a result, it transferred those policy decisions from the legislature to others—law enforcement, judges, and juries.[123]

Compare that vague statute to the Michigan child neglect statute, which criminalizes "[p]lacing a child at an unreasonable risk to the child's health or welfare."[124] The statute gives no information about what constitutes a risk or what risks are unreasonable. Is a parent who allows her ten-year-old child to walk to the park by herself putting that child at risk, or is the parent encouraging independence and developing confidence? Similar questions have arisen in recent years, and child protection statutes leave those policy questions unanswered.[125] Whether allowing a child to walk to the park unaccompanied is a crime is, as a consequence, resolved on a case-by-case basis by law enforcement and, for those defendants who insist on a trial, by judges and juries as well.[126] The delegation of authority by this and other statutes with qualitative standards appears comparable, if not identical, to the delegation in *L. Cohen Grocery Co*. Yet the recent opinion in *Johnson* reaffirmed the legitimacy of statutes with qualitative standards, stating that the Court's decision did not call the validity of those statutes into question.[127]

Statutes with qualitative standards are not the only aspect of the current criminal justice system that delegates policy authority to the executive. The current charging and bargaining system is clearly driven by the policy goals

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122. *Id.* at 86 (quoting section 4 of the Lever Act).

123. As noted above, *supra* note 31, delegation is ordinarily conceived of as a separation of powers issue, and not all states have allocated the powers between their branches of government the same as the federal government. *See* F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 NW. U. L. REV. 57, 101 (2014) (observing that "[m]any states have rejected the federal arrangement of power in favor of different allocations of power" among their various branches of government). Nevertheless, the Supreme Court has based the delegation concern presented by vague statutes on due process, and it has invoked delegation concerns when discussing state and local statutes. *See* Grayned v. City of Rockford, 408 U.S. 104, 108–10 (1972); Cline v. Frink Dairy Co., 274 U.S. 445, 457–59 (1927).

124. MICH. COMP. LAWS § 722.622(k)(ii) (2016).

125. *See Mother Successfully Challenges DCFS Decision that Prevents Her Three Children from Playing in Park*, FAM. DEF. CTR., http://www.familydefensecenter.net/client-stories/mother-challenges-dcfs-decision-that-prevents-her-three-children-from-playing-outside/ (last visited Jan. 19, 2017) (recounting a finding the Administrative Law Judge of "inadequate supervision" by a parent who allowed her children to play in a park across the street from their home while watching them through the home's window); *see also* Pimentel, *supra* note 47, at 968–71 (collecting cases).

126. For a discussion of such cases, see Pimentel, *supra* note 47, at 968–71.

127. Johnson v. United States, 135 S. Ct. 2551, 2561 (2015) ("As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct.").

of the executive, rather than the directives of the legislature. The recent political debate surrounding President Obama's use of his discretion in the immigration context provides one example of divergent policy goals. By executive order, the President indicated that he will decline to seek removal of certain undocumented immigrants who entered the United States at a young age.[128] The backlash against that decision,[129] as well as the failure of Congress to enact legislation that would have accomplished those same ends[130] are both evidence that the executive pursued policy goals that diverged from the legislature's goals.

Immigration is hardly the only area in which policy goals of the legislature and the executive have diverged. Take, for example, the recent spate of state laws decriminalizing marijuana for medical use.[131] Congress has made clear that federal law enforcement should not interfere with the ability of states to implement state laws authorizing the use, possession, distribution, or cultivation of medical marijuana.[132] But federal enforcement efforts against dispensaries operating under those state laws have continued even after Congress passed an appropriations bill forbidding federal funds from being used to prevent implementation of state medical marijuana laws.[133]

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128. *See* Memorandum from Sec'y Janet Napolitano, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Protection et al. (June 15, 2012), http://perma.cc/DH5S-3NXN.

129. *See, e.g.*, Robert J. Delahunty & John C. Yoo, *Dream on: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013).

130. S. 952, 112th Cong. (2011) (noting that Congress considered, but failed, to enact the Development, Relief, and Education for Alien Minors (DREAM) Act of 2011); *see* Delahunty & Yoo, *supra* note 129, at 784 ("[T]he Obama Administration effectively wrote into law 'the DREAM Act,' whose passage had failed numerous times.").

131. *See State Medical Marijuana Laws*, NAT'L CONF. ST. LEGISLATURES (Jul. 20, 2016), http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (providing an overview of medical marijuana programs by state).

132. *See* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014) ("None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.").

133. *See, e.g.*, David Downs, *East Bay Cities Are Standing Tall in Dispensary Battles with Feds*, E. BAY EXPRESS (Feb.10, 2015), http://www.eastbayexpress.com/LegalizationNation/archives/2015/02/10/east-bay-cities-are-standing-tall-in-dispensary-battles-with-feds/ (chronicling forfeiture efforts by U.S. Attorney's Office after passage of appropriations bill).

The divergence in policy goals can be seen not only in the selection between offenders, but also in the selection between offenses. As criminal codes have expanded to criminalize more and more behavior, enforcement trends have often not mirrored prohibition trends. For example, as Julie O'Sullivan has explained, although the federal criminal code outlaws a wide variety of behavior, federal law enforcement has focused largely on drug, immigration, and fraud offenses.[134] As a result, "prosecutors could be said to be creating their own code within a code—emphasizing drug, immigration, and fraud cases—and nullifying congressional penal choices in thousands of other available statutes through non-enforcement."[135]

IV. MOVING BEYOND VAGUENESS

As the previous Part demonstrates, the expansion of criminal codes and unchecked prosecutorial decisionmaking can result in the same problems as those created by vague statutes, yet the principles underlying the vagueness doctrine are not protected in situations involving statutes that are not vague on their face. As explained below, there is no independent reason to limit the protection of these principles to the vagueness context. Consequently, the criminal justice system ought to protect these principles—ensuring notice, preventing arbitrary and discriminatory enforcement, and prohibiting unwarranted delegations—in other contexts.

The vagueness doctrine is a necessary but insufficient tool for protecting the due process principles on which it stands. That is because the vagueness doctrine places only formalistic requirements on how the legislature may write laws; it does not place any limits on the substance of those laws.[136] Imagine, for example, that a state legislature enacts a statute stating that any violation of the criminal code is punishable by a mandatory life sentence. A prosecutor could use that statute to obtain a plea in most every case—she could tell every indicted defendant that, if he or she does not plead guilty to the charges filed, then the state will re-indict and add a charge under the new statute with the mandatory life sentence. The statute is not vague—it clearly defines the prohibited conduct (any violation of the criminal code) and the associated penalty (life imprisonment)—and thus the vagueness doctrine provides no relief to defendants charged under the statute. Under current

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134. O'Sullivan, *supra* note 43, at 654–55 (explaining how redundancy in the federal criminal code "empower[s] prosecutors vis-à-vis Congress").

135. *Id.* at 655.

136. As Kim Forde-Mazrui notes, the vagueness doctrine "constrains only the form by which legislatures can delegate discretion to executive officials, not the degree of discretion they can delegate." Forde-Mazrui, *supra* note 5, at 1504.

doctrine, it is of no moment that the statute does not provide notice regarding which defendants will be subject to the statute and which will not; it is of no moment that prosecutors can enforce the statute in an arbitrary and discriminatory fashion; and it is of no moment that the statute delegates the question of which felons deserve life sentences from the legislature to the executive. Because the statute is sufficiently precise, current doctrine does not allow the courts to protect the due process principles underlying the vagueness doctrine.

Of course, one might argue that there are independent reasons to limit the protection of these principles to the vagueness context. But such independent reasons are difficult to identify. Originalism, for example, does not indicate that these due process principles ought to be protected only in the vagueness context. The vagueness doctrine dates only to the late nineteenth or early twentieth century,[137] and there is doubt whether the doctrine is consistent "with the original understanding of the term 'due process of law.'"[138]

Nor does limiting the protection of these principles to vague statutes promote administrability.[139] That is because vagueness is hardly a standard that is easy for judges to apply. Indeed, one of the major criticisms of the vagueness doctrine is that "'indefiniteness' . . . is itself an indefinite concept."[140]

One might argue that the vagueness doctrine is appropriately narrow because only imprecise statutes implicate all three due process principles—notice, arbitrary and discriminatory enforcement, and delegation. But that is not so. There are precisely written statutes that implicate all three interests. The hypothetical statute authorizing a life sentence for any violation of the criminal code illustrates how multiple overlapping statutes with different

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137. The Supreme Court appears to have first adopted the doctrine in *International Harvester Co. of America v. Kentucky*, 234 U.S. 216 (1914) but it was adopted by lower courts in the late nineteenth century. *See, e.g.*, Louisville & N.R. Co. v. R.R. Comm'n of Tenn., 19 F. 679, 692 (C.C.M.D. Tenn. 1884); *see also* Johnson v. United States, 135 S. Ct. 2551, 2568–70 (2015) (Thomas, J., concurring in the judgment) (collecting early cases) ("[R]ather than strike down arguably vague laws under the Fifth Amendment Due Process Clause, antebellum American courts—like their English predecessors—simply refused to apply them in individual cases under the rule that penal statutes should be construed strictly.").

138. *Johnson*, 135 S. Ct. at 2572 (Thomas, J., concurring in the judgment) (explaining why it is "not clear that our vagueness doctrine can be reconciled with the original understanding of the term 'due process of law'").

139. For more on administrability, see Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006).

140. Winters v. New York, 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting); *see also* Low & Johnson, *supra* note 26, at 2052 n.2 (collecting sources criticizing the vagueness doctrine on administrability grounds).

penalties implicate all three due process principles. Statutes that employ qualitative standards implicate all of the principles as well.[141]

The best argument for protecting these due process principles only through the vagueness doctrine is that the Due Process Clause provides stronger protections against legislative actions than against executive ones. Accordingly, because the Due Process Clause imposes fewer limits on executive action, it is appropriate to provide less protection to due process principles when the government seeks to enforce a non-vague statute. There are, however, reasons to discount this argument.

It is true that, at least in the context of substantive due process,[142] the Supreme Court has stated that the due process test applied to legislation differs from the test for assessing "specific act[s] of a governmental officer."[143] For legislation, the question is whether the law infringes a fundamental right "deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty."[144] By contrast, executive action violates substantive due process only if it "'shocks the conscience' and violates the 'decencies of civilized conduct.'"[145] The difference in those tests suggests that the Due Process Clause places different limits on the executive and the legislature.

But it is hardly clear that the test applied to executive action is more difficult to satisfy than the one applied to legislation.[146] In order for legislative action to run afoul of substantive due process, it must infringe on a

141. Of course, the problem with qualitative standards may be that those standards are not sufficiently precise to satisfy due process. Prohibiting an individual from, for example, acting in an unreasonable fashion does not provide notice of what is forbidden, it permits arbitrary and discriminatory enforcement, and it delegates policy matters from the legislature to the executive. And yet the vagueness doctrine, in its current form, classifies such qualitative standards as constitutional. *See Johnson*, 135 S. Ct. at 2561 ("As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct . . . .").

142. It is not clear whether the vagueness doctrine derives from substantive or procedural due process. *Compare* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 318 (1993) ("Statutes that do not provide fair warning of the conduct that they proscribe are . . . vulnerable to attack on substantive due process grounds."), *with Johnson*, 135 S. Ct. at 2567 (Thomas, J., concurring in the judgment) ("Although our vagueness doctrine is distinct from substantive due process, their histories have disquieting parallels.").

143. Cty. of Sacramento v. Lewis, 523 U.S. 833, 846 (1998).

144. Washington v. Glucksberg, 521 U.S. 702, 720–22 (1997).

145. *Lewis*, 523 U.S. at 846 (quoting Rochin v. California, 342 U.S. 165, 172–73 (1952)).

146. *The Supreme Court 1997 Term Leading Cases*, 112 HARV. L. REV. 192, 198 (1998) (stating that the Court has "sent mixed signals about whether its test would in fact set a higher bar for executive challenges than for legislative challenges").

fundamental right that is deeply rooted in history.[147] As Justice Scalia has noted, that historical inquiry may be more difficult for litigants to satisfy than the shocks the conscience standard. This is because the former inquiry is objective, while the latter is subjective.[148]

More important, even if the Due Process Clause does provide fewer protections against the executive, the stronger due process protections should nonetheless apply to prosecutions under overlapping statutes and statutes with qualitative standards schemes. That is because the due process concerns resulting from those prosecutions are the product of legislative, not executive, action. It is the legislature that enacts overlapping statutes and statutes with qualitative standards schemes, and these statutory schemes are what create the problems of notice, arbitrary and discriminatory enforcement, and delegation to prosecutors of policy decisions. To be sure, prosecution under these statutory schemes is the way in which a person is negatively affected by these statutory schemes. But that is the case with vague statutes too. Vague statutes threaten due process principles only when the executive seeks to enforce them.[149]

If courts ought to vindicate vagueness principles even when non-vague statutes are not in play, one might wonder how they ought to vindicate those principles. There are a number of steps courts could take. Current doctrines strongly favor prosecutors' interests in setting enforcement goals and disposing of cases efficiently.[150] Courts could balance the concern for prosecutorial interests with protection to those principles underlying the vagueness doctrine. For example, rather than requiring a showing "that

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147. *Glucksberg*, 521 U.S. at 720–22.

148. *Lewis*, 523 U.S. at 861–62 (Scalia, J., concurring in the judgment).

149. *See* Brief for Amici Curiae of Scholars of Criminal Law, Federal Courts, and Sentencing in Support of Petitioner at 9, Beckles v. United States (No. 15-8544) (noting that the Supreme Court "applie[s] the vagueness doctrine in order to protect the due process rights of individuals who were arrested and charged under [vague] laws, even though some other individuals benefited from exercises of discretion which enabled them to avoid the formal legal consequences of being directly subject to unconstitutionally vague provisions").

150. *See* United States v. Armstrong, 517 U.S. 456, 465 (1996) ("Judicial deference to the decisions of these executive officers . . . stems from a concern not to unnecessarily impair the performance of a core executive constitutional function."); Wayte v. United States, 470 U.S. 598, 607 (1985) ("Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy."); *see also* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[B]y tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.").

similarly situated defendants of other races could have been prosecuted, but were not" before permitting discovery on a selective prosecution claim,[151] discovery could be ordered based on a lesser showing.[152] Or courts could use the Eighth Amendment's prohibition on cruel and unusual punishment to place substantive limits on the imposition of non-capital punishment, which could limit prosecutorial leverage in plea bargaining.[153] Alternatively, courts could construe overlapping statutes against a backdrop assumption that Congress intended only the lesser penalty to apply to defendants whose conduct is captured by multiple statutes.[154] Or courts could require some sort of reason-giving on the part of prosecutors regarding their plea bargaining or other decisions.[155]

Unlike the vagueness doctrine, these other approaches directly address the problems associated with expansive and overlapping criminal codes and unfettered prosecutorial discretion. While it is not the purpose of this Essay to propose any specific solutions to these problems, any effective protection of vagueness principles must, at a minimum, look not only at a prosecutor's need to set policy and dispose of cases, but also at the defendant's need for notice and need for protection against arbitrary and discriminatory enforcement, as well as the public's interest in avoiding policy delegation. After all, if the principles underlying the vagueness doctrine are important enough to constrain how legislatures can enact laws, then they should also play some role in setting limits on law enforcement. Put another way, vagueness principles are not limited to the vagueness context, and so courts should either rethink their commitment to the vagueness doctrine, or they ought to start addressing those principles more directly.

Indeed, seeking to protect these principles directly is also consistent with the history of the vagueness doctrine. As others have noted, the Court has

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151. *Armstrong*, 517 U.S. at 469–70. This is the current showing required under *Armstrong*. *Id.*

152. *See* McAdams, *supra* note 79, at 624–40 (suggesting a reduced showing for discovery in selective prosecution claims).

153. *See* John F. Stinneford, *Dividing Crime, Multiplying Punishments*, 48 U.C. DAVIS L. REV. 1955, 2001–03 (2015); Stuntz, *supra* note 71, at 368–69.

154. The Seventh Circuit adopted such an approach in the *Batchelder* case, but it was reversed by the Supreme Court. United States v. Batchelder, 581 F.2d 626, 630 (7th Cir. 1978) (concluding that two overlapping statutes with different penalties "arguably contradict each other" and electing to resolve the resulting ambiguity "in favor of lenity"), *rev'd*, 442 U.S. 114 (1979).

155. *See* Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1, 6 (2012); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 196 (2008).

previously used the vagueness doctrine in order to protect certain substantive rights.[156] In the early twentieth century, the Court used the doctrine to protect economic rights against government regulation.[157] And in the mid- to late-twentieth century, the Court used the vagueness doctrine to protect First Amendment rights.[158] Notably, in both timeframes, the Court did not rely only on the vagueness doctrine to protect those substantive rights. It regularly struck down non-vague legislation that impaired those rights. In other words, the Court did not use the vagueness doctrine as its only method to protect those rights. It also developed substantive doctrines to protect those rights, and it employed the vagueness doctrine to create "an insulating buffer zone of added protection at the peripheries" of those rights.[159] This direct approach allowed the courts to act even when the legislation impairing those rights was written in precise terms that would have survived a vagueness challenge.

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The courts developed the vagueness doctrine to ensure notice, to protect against arbitrary and discriminatory enforcement, and to prevent unwarranted delegations. Expansive and overlapping criminal codes, as well as essentially unfettered prosecutorial discretion have exacerbated these problems, making the vagueness doctrine unequal to the task of protecting these due process interests. In order to vindicate the principles underlying the vagueness doctrine, the courts must look beyond vagueness. They must seek to provide notice, protect against arbitrary and discriminatory enforcement, and prevent unwarranted delegation even when a statute is not vague on its face.

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156. *See* Anthony G. Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75–85 (1960).

157. *See id.* at 81–82; Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1181–83 (2013); *see also* Johnson v. United States, 135 S. Ct. 2551, 2570 (2015) (Thomas, J., concurring in the judgment) ("During the *Lochner* era, a period marked by the use of substantive due process to strike down economic regulations . . . the Court frequently used the vagueness doctrine to invalidate economic regulations penalizing commercial activity.").

158. *See* Amsterdam, *supra* note 156, at 74 n.38, 82; Sohoni, *supra* note 157, at 1184; *see also Johnson*, 135 S. Ct. at 2571 (Thomas, J., concurring in the judgment) ("Around the time the Court began shifting the focus of its substantive due process (and equal protection) jurisprudence from economic interests to 'discrete and insular minorities' . . . the target of its vagueness doctrine changed as well. . . . In more recent times, the Court's substantive due process jurisprudence has focused on abortions, and our vagueness doctrine has played a correspondingly significant role.").

159. Amsterdam, *supra* note 156, at 75.